BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF SOUTH MILWAUKEE
(STREET DEPARTMENT)

and

MILWAUKEE DISTRICT
COUNCIL 48, AFSCME, AFL-CIO
and its affiliated LOCAL 883

Case 60
No. 41414
MA-5380

Appearances:

Podell, Ugent and Cross, by Ms. Monica Murphy, 207 East Michigan Street, Suite 315, Milwaukee, Wisconsin 53202, on behalf of the Union.

Mr. Joseph G. Murphy, City Attorney, 2424 15th Avenue, South Milwaukee, Wisconsin 53172, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the City and the Union, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned, a member of its staff, to hear the instant dispute. Hearing was held on March 21, 1989 in South Milwaukee, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on April 20, 1989. Based upon the record herein, and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties were unable to stipulate at hearing to the issue. The Union framed the issue as follows:

> Did the City of South Milwaukee violate the Collective Bargaining Agreement specifically Articles 30, 31, and 32 when it assigned a side loader operator to operate a new low entry rear loader collector by himself?
>
> If so, what is the appropriate remedy?

The City framed the issue in the following manner:

> Did the City of South Milwaukee violate the collective bargaining agreement, Article 30 when assigning a Side Loader Operator to operate a new, low-entry rear loader collection vehicle by himself. If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issue as follows:

> Did the City violate the collective bargaining agreement, when it assigned a Side Load Operator, Tom Rogatzki, to operate a new low-entry rear loader collection vehicle by himself? If **so,** what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE:

ARTICLE XXX
Working Conditions

Agreements pertaining to working conditions which are mandatory subjects for bargaining and in effect as of the time of this Agreement shall remain in effect, unless changed by mutual consent in writing during the term of this Agreement.

ARTICLE XXXI
Job Descriptions

A.) The job description and classifications in effect as of the date of this Agreement shall continue in effect.

B.) In the event the Municipality makes a change of the following type, then the wage rate for the effected positions shall be negotiated between the parties.

(1) New full-time classifications provided said classifications are within the work scope of the bargaining unit.

(2) A substantial change in duties of a classification which is fairly within the scope of the responsibilities applicable to the kind of work performed by the employees of the classification. If the substantial change of

duties occurs only to some of the positions within the classification, negotiations shall be limited to the position involved.

(3) Assignment of new duties to a position which are not fairly within the scope of duties applicable to the work performed by the employees of the classification involved. Such negotiations shall be limited to the positions involved.

(4) Where new types of equipment are utilized or new operations are established which were not being used or performed by the Municipality at the time of the execution of this Agreement.

C.) In the event negotiations fail, unresolved disputes under paragraph B shall be submitted to the third party resolution procedure in paragraph D; however, nothing herein shall be construed as a limitation upon the City's authority to implement assignment of duties.

D.) Impasse Resolution Procedure

(1)(a) If a dispute under Article XXXI, B, has not been settled after a reasonable period of negotiations, and the parties are deadlocked with respect to the wage rates, either party may initiate arbitration of the dispute by serving upon the other party a written notice of intent to proceed to interest arbitration under this paragraph. The arbitrator selected shall be experienced in classification and compensation. If the parties cannot mutually agree upon the selection of an impartial mediator/arbitrator within ten (10) days of such notice, either party may request the Wisconsin Employment Relations Commission to submit to them a list of five (5) mediator/arbitrators, each of whom shall be experienced and expert in the field of classification and compensation. In the event the Wisconsin Employment Relations

Commission is unable to provide a list of such experienced and expert nediator/arbitrators, then the American Arbitration Association shall be requested to provide such a list.

(b) If the parties cannot agree upon one of the persons named on the list, the parties shall strike a name alternately until one (1) name remains. The determination of who strikes first shall be decided by the flip of a coin. Such remaining person shall act as the mediator arbitrator.

(c) The requesting party shall submit a written notice to the arbitrator containing the names and addresses of the principals of both parties as well as a copy of the labor agreement. Upon receipt of such documents, the mediator/arbitrator shall fix a time and place for a hearing on the dispute within thirty (30) days, unless a longer time is agreed to by the parties.

(2) Authority of the Mediator/Arbitrator

(a) The mediator/arbitrator may only consider resolution of disputes that were raised in writing by either party within sixty (60) days of the change or within sixty (60) days of the time the party could reasonably have been aware of the change. Such dispute shall be limited to a single classification except when otherwise agreed.

(b) The mediator/arbitrator shall first attempt to mediate the dispute and encourage a voluntary settlement by the parties. If the parties fail to reach a voluntary settlement after a reasonable period of mediation, as determined by the mediator/arbitrator, the mediator/arbitrator shall call for the final offers from each of the parties. However, in

petitions under Article XXXI, B, (2) and (3), where either party claims that the change was de minimus, the mediator/arbitrator, acting as arbitrator, shall first conduct a hearing on this question. If found to be de minimus, the petition shall be dismissed.

(c) The mediator/arbitrator shall only accept final offers which pertain to wage rates.

(d) Upon receipt of final offers from the parties, the mediator/arbitrator, acting as arbitrator, shall set a time and a place for a hearing for the purpose of providing the opportunity to both parties to explain their final offers or to present testimony, witnesses or relevant evidence with respect to all matters covered in the final offers of the parties. The mediator/arbitrator, acting as arbitrator, shall adopt without modification a final offer of one of the parties on the issues in dispute, which decision shall be final and binding on both parties and shall be incorporated into the bargaining agreement. The mediator/arbitrator, acting as arbitrator, shall serve a copy of his/her decision on both parties. Either party may request a transcript of the hearing at its own expense and shall provide the mediator/arbitrator with a copy. If both parties request a transcript, the cost of the arbitrator's copy shall be borne equally between the parties.

(e) When an arbitrator selects a final offer that changes wage rates, the arbitrator shall determine the effective date of the change, provided that no such effective date shall precede the date of the change or predate by sixty (60) days the request to negotiate the new salary, whichever is later. Any change in the wage rate shall apply only to the person or persons performing such job during the aforementioned periods.

(3) Factors to be considered. In making any decision under the arbitration procedure authorized in this section, the mediator/arbitrator shall give weight to the following factors:

(a) The lawful authority of the municipal employer.

(b) Stipulations of the parties.

(c) Comparisons of the duties and responsibilities of the new or changed position with **wages,** duties and responsibilities of other Local 883 bargaining unit positions.

(d) The relationship of the duties and responsibilities of the full-time position before and after the change, if appropriate.

(e) The comparison in wage rates of the employees involved in the arbitration proceeding with the wage rates of other employees performing similar services and with other employees generally in public employment in the same services and with other employees generally in public employment in the community and in comparable communities and in private employment in the same community and in comparable communities.

(4) Mediation/Arbitration Costs. The expenses of the mediator/arbitrator shall be borne equally by the parties. The expenses and compensation of any witnesses or participants in the mediation/arbitration hearings shall be paid by the party calling such witnesses or requesting such participants.

(5) Any matter or matters pending before a mediator/arbitrator for which there has not been a hearing conducted by the mediator/arbitrator at the time one or both parties give notice to the other to open negotiations for a successor agreement shall be dropped and shall become a subject of such negotiations for a successor agreement.

Any matter or matters for which at least one (I) hearing has been conducted by the mediator/arbitrator may continue to proceed under the provisions of Article XXXI, D, to resolution. Such matter or matters shall not be raised as a demand for the successor Agreement without the consent of both parties.

The negotiations for a successor agreement shall continue to be regarded by the parties as the procedure to be preferred as the forum for the settlement of differences regarding rates of pay for changes in job duties.

(6) Job Descriptions. When new duties are assigned to a position which are not fairly within the scope of the duties applicable to the work performed by the employees of the classification involved, the City will provide the Union with the new job description as soon as practical prior to commencement to negotiations under A and B on page 1. Neither the Union nor its member shall impede the City in its attempt to gather information in preparing such job descriptions.

ARTICLE XXXII

GARBAGE AND REFUSE COLLECTION

In accordance with the provisions of Article XXXI, New Operations and Equipment, the City agrees to the following wage rates and practices relating to garbage and rubbish collection methods and equipment utilization.

JOB CLASSIFICATION - New job classifications created are:

1. Side Loader Operator
2. Rear Loader Collector - Driver (Two men assigned to rear loading refuse collection vehicle.)

WAGE RATES (TASK RATES) - The wage rates to be paid within each of the two job classifications are:

FACTS:

On November 30, 1987, the City assigned the Grievant, Tom Rogatzki, to operate a rear-loading garbage collection truck. He was normally assigned to a side-loader garbage collection truck.

Prior to 1987, the City operated two types of garbage collection vehicles: the side loader which is a low entry truck in which garbage is dumped into the bin immediately behind the front wheels, and a rear loader which has a traditional truck cab and in which the garbage is dumped in a bin at the rear of the truck. Based on these two types of vehicles, two pay classifications were set out. There was one pay rate for the side loader operator who operates the truck by himself and there was a second rate for the rear loading refuse collection vehicle. There was no pay

classification for the one-man operation of a rear loading vehicle.

In approximately mid-1987, the City put into operation two new vehicles that consist of low-entry cabs and a rear-loading bin. Shortly after these vehicles were put into use, the City solicited opinions from the garbage collection employes on their use. The employes identified several areas of concern including: difficulty in judging the distance between the garbage cans and the back of the truck where the garbage was loaded; the distance from the cab to where the garbage was loaded (28 feet compared to 9 feet for a side loader); and the fact that garbage in the new truck can only be packed while the collector was standing at the back of the truck operating the packer, while with the side loader the garbage could be packed while the truck was moving to its next stop.

Rogatzki was operating one of the new vehicles noted above on the date in question. Rogatzki normally has no problem completing his route by himself when using a side loader, but with a rear loader vehicle he has required assistance from other side loaders in order to finish his route. He may make less stops with the aforesaid rear loader because occasionally he can collect both sides of the alley on one stop. There is essentially no change in duties between the operator of the side loader and the operation of the rear loader; it took Rogatzki approximately one-half hour to learn to operate the rear loader. If Rogatzki finishes his route early, he helps other side load operators finish their routes.

The second of the two rear-loading low-entry vehicles was purchased as a backup for the side loader vehicles. It is to be used primarily when a side loader vehicle is in the shop for maintenance. It is undisputed that on the occasions when Rogatzki was asked to use the rear loading vehicle, his side loader vehicle was not available due to mechanical difficulties.

The contract applicable here was tentatively agreed to in November of 1987. The first rear-loading low-entry vehicle was delivered in early 1987 or late 1986, but was used only for commercial routes. The second one was delivered in mid-1987 and held in reserve for replacement when a side loader or commercial vehicle had broken down.

The Street Department has budgeted a new side loader vehicle for 1989. There are currently four side loader vehicles in use in the City. When the new one is received, the City intends to maintain one of the older side loader vehicles as a spare available in the event of a breakdown. Mr. Schmitt, the Supervisor of the Street Department, intends to request the City budget another new side loader vehicle for 1990. The Street Department has incurred no overtime by the occasional use of the rear loader vehicle with a single man. However, inasmuch as new portions of the City are being developed, the City is studying the possibility of expanding routes. With expanded routes, more wear and tear would occur with respect to the vehicles in use. Thus, it is reasonable to anticipate that the rear end loaders would nevertheless be held in reserve to be used in the event of side-loader breakdowns.

It is undisputed that during all the times applicable hereto any Side Loader Operator assigned to

use the rear-loading low-entry vehicles has been paid Side Loader rate of pay.

Union:

The Union basically argues that by assigning one man to operate the new low entry rear loaders by himself the City violated several provisions of the parties' collective bargaining agreement.

In support thereof, the Union first maintains that the City altered the working conditions of these collectors in violation of Article XXX. The Union points out that it did not consent to any such changes in writing as required by the contract. The Union contends that the working conditions were altered because two men had always previously been assigned to a rear loading truck and because the work was greater.

The Union next maintains that the City in effect created a new job description and classification without first negotiating the change with the Union in conformance with the requirements of Article XXXI. The Union further maintains that the City violated the provisions of Article XXXI and XXXII in that the City made a substantial change in the duties of a classification and implemented new equipment without first negotiating wage rates for the positions affected with the Union.

For a remedy, the Union requests that the grievance be sustained and that the Arbitrator order the City to cease and desist from assigning one man to the rear loader trucks, and to negotiate any new classifications or descriptions with the Union prior to implementation.

City:

The City argues that the record supports a finding that the assignment to the rear loading vehicle in question does not constitute a "substantial change in duties", or "assignment to new duties which are not fairly within the scope of duties applicable to the work performed by the employees of the classification involved."

The City also argues that this is not a "new operations" case since it has been engaged in the business of refuse collection for many years prior to the execution of the instant contract, and has assigned a single employe to collection vehicles which were designed with a low-entry cab in the past.

Finally, the City argues that because assignment to the aforesaid vehicle did not constitute any change in duties and required only one-half hour training, the vehicle in question cannot be said to be a "new type of equipment" warranting negotiation of a new wage classification. (emphasis supplied.) The City adds that only those new types of equipment which change the job by changing the nature of the work require wage negotiations. The City also notes that the assignment is only temporary, a short-term response to aging equipment repair needs; and is not a permanent reassignment of duties or manner of operation.

Based on the above, the City requests that the grievance be dismissed. In the alternative, if the Union prevails, the City argues that the only appropriate remedy is a requirement that the City sit down and negotiate a wage rate for the affected position with the Union.

DISCUSSION:

At issue is whether the City violated the parties' collective bargaining agreement when it assigned Rogatzki to operate a new low-entry rear loader collection vehicle by himself.

Article XXXI, Section B provides that when the City makes certain changes then the wage rate for the affected positions shall be negotiated between the parties. Subsection (4) indicates that one of the changes requiring negotiation includes "new types of equipment" being utilized which were not being used by the City at the time of the execution of the instant agreement. The City does not raise an issue, nor does the record support a finding that the vehicle in dispute was used in the manner grieved herein prior to the execution of the collective agreement. The first rear end loader was not used for non-commercial garbage collection until mid or late-1987 and this usage was represented to be on a trial basis. A question remains as to whether this vehicle is a "new type of equipment" within the meaning of Article XXXI, Section B, Subsection (4). For the reasons listed below, the Arbitrator finds that said vehicle is a "new type of equipment" as set forth in Section B.

The City's own actions indicate that this is a new type of equipment. At the time of their introduction, the City solicited opinions from the garbage collection employes as to its use. Said employes identified a number of areas of concern which they communicated to the City. One employe, not two, operates the new rear loading vehicle. The method of operation is also different. For example, occasionally, the sole operator can collect two sides of an alley on one stop whereas with the other two trucks, this is not normally done. The distance one walks with the new vehicle is also greater. The operation of the packers on the two vehicles is different. The placement and degree of difficulty egressing from the cabs is also different.

The City argues, however, that only those new types of equipment which change the job by changing' the nature of the work require wage negotiations. The Arbitrator does not agree. If the parties had intended Article XXXI, Section B, Subsection (4) to read this way, they could have so stated in a clear manner when they negotiated and signed the collective bargaining agreement. There is no persuasive evidence of a past practice or bargaining history to support the City's interpretation of the disputed language. The Arbitrator will not read something into the agreement which the parties themselves did not include.

Nor does the temporary nature of this assignment make a difference as to the City's contractual responsibilities. First, there is no evidence as to how long the City will be using rear-end loaders for back-up given the City's consideration of expanded routes in the future. More importantly, however, the specific languages of Article XXXI, Section B contains no exceptions for temporary usage.

Having reached the above conclusions, the Arbitrator finds it unnecessary to decide the other issues raised by the parties except as they pertain to the appropriate remedy. The Union requests a remedy that the Arbitrator order the City to cease and desist from assigning one man to the rear loader vehicles, and that any new classification or descriptions be negotiated. The Union bases this request on the language of Articles XXX and XXXII. Article XXX provides in general terms that agreements pertaining to working conditions which are mandatory subjects of bargaining and in effect at the time of the agreement, shall remain in effect unless changed in writing during the term of the agreement. In the opinion of the Arbitrator, the general language of Article XXX must give way to the more specific language of Article XXXI, Section B, Subsection (4) which is controlling herein. Article XXXII provides, "In accordance with the provisions of Article XXXI, New Operations and Equipment, the City agrees to the following wage rates and practices relating to garbage and rubbish collection methods and equipment utilization . . . " (Emphasis added.) Therefore, by the parties' own express agreement the language of Article XXXII is governed by the more specific language of Article XXXI.

A permanent cease and desist order as requested by the Union is inappropriate under these circumstances. Rather directing the parties to immediately comply with Article XXXI and the procedure set forth under this provision of the collective bargaining agreement constitutes the most appropriate remedy in the instant case.

In light of the foregoing, and the record as a whole, it is my

AWARD

1. That the City violated the parties' collective bargaining agreement, specifically Article XXXI by its assignment of the rear-end loader as a one-person operation on non-commercial routes without bargaining with the Union over wages and other working conditions which may have resulted from the introduction of this new piece of equipment.

2. That the City is ordered to immediately commence negotiations with the Union pursuant to Article XXXI of the parties' collective bargaining agreement with respect to a wage rate for the new position/classification involving operation of the new, low-entry rear-loader collection vehicle.

Dated at Madison, Wisconsin this 13th day of July, 1989.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator

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